UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	**Docket Number:**
TIMOTHY JONES and AO SHIBI, INC.,	**PI1001697**
Respondents.	

INITIAL DECISION AND ORDER

Issued:

December 20, 2011

Issued By:

Hon. Parlen L. McKenna
Presiding

APPEARENCES:

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I. Statement of the Case

This case involves an administrative enforcement and penalty action filed by the National Oceanic and Atmospheric Administration's (NOAA or Agency) against Respondents Timothy Jones and AO Shibi, Inc. for alleged violations of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) – 16 U.S.C. § 1801 et seq. The Agency alleged in its Notice of Violation and Assessment (NOVA) that Respondents committed one violation of the Magnuson Act for events that occurred on or about March 29, 2010 through April 15, 2010. Specifically, the NOVA claimed that Respondents violated the Magnuson Act and Agency regulations at 50 C.F.R. § 665.15(a) by fishing without a valid Hawaii Longline Limited Entry Permit. For this violation, the Agency proposed a civil penalty of $1,500.00.

Respondents admitted the fact of violation through stipulation but argued that a warning was warranted in lieu of a monetary penalty as the violation was inadvertent and they had no prior fishery violations. In particular, Respondents claimed that the Agency regularly sends reminder notices to permit holders to renew their permits but that in this particular instance Respondents never received such a reminder. Respondents acknowledged that the Agency was under no obligation to send such reminders and recognized that the timely filing a renewal application for the permit was solely their responsibility. Having reviewed the stipulations of the parties and the record evidence, I find: (1) the alleged violation **PROVEN** and (2) the imposition of a civil penalty in the amount of $1,000.00 appropriate under all the facts and circumstances.

II. Procedural History

On June 25, 2010, the Agency served its NOVA on Respondents. On January 3, 2011, Respondents filed a request for hearing.[1] On February 14, 2011, the Coast Guard Chief Administrative Law Judge issued a Notice of Transfer and Assignment of Administrative Law Judge and Order Requesting Preliminary Positions on Issues and Procedures (PPIP), by which this case was assigned to me for hearing and disposition.

On March 14, 2011, Agency counsel filed the Agency's PPIP. On March 15, 2011, Respondents filed their PPIP.

On June 17, 2011, I issued an Order which set the case for hearing to commence on September 1, 2011 in Honolulu, Hawaii. On September 1, 2011, the hearing commenced as scheduled. The Agency was represented by Ms. Alexa A. Cole, Esq. and Respondents were represented by Mr. Bryan Y. Y. Ho, Esq.

At the commencement of the hearing, the parties filed a set of Joint Stipulations, by which Respondents admitted all the necessary jurisdictional elements and the facts constituting a violation. See Tr. at 4:15-19.[2] As such, the hearing concerned only the issue of the penalty, if any, to be assessed for the stipulated violation. In support of its position on this subject, the Agency offered 1 witness and 8 exhibits. Respondents offered 1 witness and no exhibits in rebuttal. The witnesses who testified at the hearing and the exhibits entered into evidence are identified in **Attachment A**.

[1] Respondents' hearing request was timely filed pursuant to an agreement with Agency counsel allowing an extension of time to make such request.

[2] References to the transcript are abbreviated as "Tr. [page number]:[line number]; references to Agency Exhibits as "Agency Exh. [numeric]".

At the hearing, both parties waived submission of post-hearing briefs; proposed findings of fact and conclusions of law; and elected to make final arguments orally on the record. See Tr. at 37:18-42:14.

The record of this proceeding, including the transcript, evidence, pleadings and other submissions, has now been reviewed and the case is ripe for decision. The findings of fact and conclusions of law that follow are prepared upon my analysis of the entire record, applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully examined and given thoughtful consideration.

III. Principles of Law

A. Agency's Burden of Proof

In order to prevail on the charges instituted against a respondent, the Agency must prove the violations alleged by a preponderance of the evidence. 5 U.S.C. § 556(d); In re Cuong Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). The Agency may rely on either direct or circumstantial evidence to establish the violation and satisfy its burden of proof. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-765 (1984). The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to a respondent after the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. Steadman v. S.E.C., 450 U.S. 91, 101 (1981).

As provided in the recent change to the Agency's regulations, the Agency must justify "that its proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law" and no presumption of correctness attaches to NOAA's proposed

penalty amount. See 75 Fed. Reg. 3563, 2010 WL 2505213 (June 23, 2010) (amending 15 C.F.R. § 904.204(m) and providing that the judge is empowered to assess a sanction de novo in light of applicable law).

B. The Charge against Respondents

The Agency charged Respondents with one violation of the Magnuson Act and Agency regulations at 50 C.F.R. § 665.15(a) in connection with Respondents alleged fishing without a valid Hawaii Longline Limited Entry Permit. The Agency claimed that Respondents committed the violation in connection with a fishing trip using the F/V AO SHIBI GO on or about March 29, 2010 through April 15, 2010. NOVA at 1; see also 50 C.F.R. Part 665 (Agency regulations concerning fisheries in the Western Pacific).

The Magnuson Act makes it unlawful for any person to violate any provision of the Act or any regulations or permit issued under the Act. See 16 U.S.C. § 1857(1)(A). Agency regulations provide that it is unlawful to:

> [e]ngage in fishing without a valid permit or a facsimile of a valid permit on board the vessel and available for inspection by an authorized officer, when a permit is required under §§ 665.13 or 665.17, unless the vessel was at sea when the permit was issued under § 665.13, in which case the permit must be on board the vessel before its next trip.

50 C.F.R. § 665.15(a) (as effective February 16, 2010 to July 26, 2011).

The Agency sets forth the requirements for specific permits in the Western Pacific fisheries in 50 C.F.R. Part 665, Subparts B through F. 50 C.F.R. § 665.13(a).[3] In Subpart F, the regulations require a valid Hawaii longline limited access permit to fish for western Pacific

[3] The regulations at 50 C.F.R. § 665.17 address experimental fishing permits, which are irrelevant to this case.

pelagic management unit species using longline gear in the EEZ[4] around the Hawaiian Archipelago or to land or transship, shoreward of the outer boundary of the EEZ around the Hawaiian Archipelago, western Pacific pelagic management unit species that were harvested using longline gear. 50 C.F.R. § 665.801(b)(1)-(2). The regulations make it unlawful to "[u]se a vessel in the EEZ around the Hawaiian Archipelago without a valid Hawaii longline limited access permit registered for use with that vessel, to fish for western Pacific pelagic [management unit species] using longline gear, in violation of § 665.801(b)(1)." 50 C.F.R. § 665.802(c).

A Hawaii longline limited access permit is only valid for the period specified on the permit, unless revoked, suspended, transferred, or modified under 15 C.F.R. Part 904 and the general requirements governing the application, issuance, expiration and sanctions for permits issued for such permits are contained in 50 C.F.R. § 665.13. See 50 C.F.R. §§ 655.13(g), 665.801(k).

IV. Findings of Fact

1. At all times material to this case, AO Shibi, Inc. was, and continues to be, the documented owner of the F/V AO SHIBI GO, O.N. 554581. Joint Stipulation at ¶ 1.

2. AO Shibi, Inc. owns and operates another vessel, the F/V AO SHIBI FOUR, which also has a Hawaii Limited Entry Permit. Tr. at 25:6-15.[5]

3. AO Shibi, Inc. first got a Hawaii Limited Entry Permit in 2002, with the F/V AO SHIBI GO receiving its first such permit in 2005. Tr. at 25:16-19.

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[4] The EEZ (Exclusive Economic Zone) is defined as "the zone established by Presidential Proclamation 5030, 3 CFR part 22, dated March 10, 1983, and is that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles (370.40 km) from the baseline from which the territorial sea of the United States is measured." 50 C.F.R. § 600.10.

[5] The F/V AO SHIBI FOUR's longline permit had also expired but that vessel did not engage in fishing activities before Respondents obtained a renewed permit at the same time as getting such a renewal for the F/V AO SHIBI GO. See Tr. at 28:23-29:8.

4. At all times material to this case, the F/V AO SHIBI GO was, and continues to be a U.S. Coast Guard documented vessel with a commercial fishing vessel endorsement. Joint Stipulation at ¶ 2.

5. AO Shibi, Inc. has been the registered owner of a Hawaii Longline Limited Entry Permit #554581 since 2005. At no time has Respondents' ownership of this permit been suspended, revoked, transferred or modified. Joint Stipulation at ¶ 3.

6. At all times material to this case, Timothy Jones was, and continues to be the Master of the F/V AO SHIBI GO. Joint Stipulation at ¶ 4.

7. Timothy Jones has been an officer and shareholder of AO Shibi, Inc. since March 1993. Tr. at 25:3-5.

8. At all times material to this case, AO Shibi, Inc. and Timothy Jones were "persons" as defined under the Magnuson-Stevens Fishery Conservation and Management Act. Joint Stipulation at ¶ 5.

9. A vessel of the United States must be registered for use under a valid Hawaii Longline Limited Entry Permit if that vessel is used:

a. to fish for Pacific pelagic management unit species using longline gear in the exclusive economic zone ("EEZ") around the Hawaiian Archipelago; or

b. to land or transship, shoreward of the out boundary of the EEZ around the Hawaiian Archipelago, Pacific pelagic management unit species that were harvested using longline gear. Joint Stipulation at ¶ 6.

10. The F/V AO SHIBI GO was duly and properly registered with the National Marine Fisheries Service ("NMFS"), Pacific Islands Regional Office ("PIRO") for use in

connection with the 2009 Hawaiian Longline Limited Entry Permit ("Permit") issued to AO Shibi, Inc. Joint Stipulation at ¶ 7.

11. AO Shibi, Inc.'s Permit was effective March 3, 2009, and expired on March 3, 2010. Joint Stipulation at ¶ 8.

12. Respondents fished with the F/V AO SHIBI GO between March 30 and April 13, 2010, using longline gear. Joint Stipulation at ¶ 9.

13. Respondent, Timothy Jones, completed and signed the NMFS Western Pacific Longline Fishing Logs (#422734-422748) for all sets made between March 30 and April 13, 2010. Joint Stipulation at ¶ 10.

14. The NMFS Western Pacific Longline Fishing Logs (#422734-422748) document that western Pacific pelagic management unit species were caught. Joint Stipulation at ¶ 11.

15. All fishing conducted by Respondents during the period March 30 and April 13, 2010 was inside the EEZ around the Hawaiian Archipelago. Joint Stipulation at ¶ 12.

16. Hawaii Longline Limited Entry Permits expire on March 3rd of every year. Joint Stipulation at ¶ 13.

17. When Respondents engaged in longline fishing operations for western Pacific pelagic management unit species between March 30 and April 13, 2010, AO Shibi, Inc.'s Permit had expired. Joint Stipulation at ¶ 14.

18. When Respondents engaged in longline fishing operations for western Pacific pelagic management unit species between March 30 and April 13, 2010, AO Shibi, Inc. did not have a Hawaii Longline Limited Entry Permit issued for the March 3, 2010 to March 3, 2011 term. Joint Stipulation at ¶ 15.

19. Respondents received a total of $39,620.73 for the fish caught during their March 30-April 13, 2010 fishing operations. Agency Exh. 8.

20. NOAA voluntarily reminds holders of Hawaii Longline Limited Entry Permits that their permits need to be renewed annually in March every year by sending renewal packets via the U.S. Postal Service. Joint Stipulation at ¶ 16; see also Tr. at 20:21-23:7.

21. NOAA has engaged in this practice as long as AO Shibi, Inc. has owned a Hawaii Longline Limited Entry Permit. Joint Stipulation at ¶ 17.

22. AO Shibi, Inc.'s application to renew its Hawaii Longline Limited Entry Permit for the 2010-2011 term was received by NOAA on June 14, 2010. Joint Stipulation at ¶ 18.

23. All of the information AO Shibi, Inc. submitted on its 2010 Hawaii Longline Limited Entry Permit application for the F/V AO SHIBI GO and AO Shibi, Inc.'s contact information was identical to the information previously provided to NMFS PIRO in support of prior permit renewals. Joint Stipulation at ¶ 19.

24. AO Shibi, Inc.'s failure to renew its Hawaii Longline Limited Entry Permit prior to March 3, 2010 was the only time Respondent has not renewed its permit in a timely manner. Joint Stipulation at ¶ 20.

25. Respondents did not conduct any further fishing operations after discovery its Permit had expired and prior to the issuance of a replacement. Joint Stipulation at ¶ 21.

26. Subsequent to AO Shibi, Inc.'s submission of its application and fee for renewal, NMFS PIRO issued Respondents a new Hawaii Longline Limited Entry Permit that expired on March 3, 2011. Joint Stipulation at ¶ 22.

27. AO Shibi, Inc. timely renewed its Hawaii Longline Limited Entry Permit for the March 3, 2011 through March 3, 2012 term. Joint Stipulation at ¶ 23.

28. Neither AO Shibi, Inc. nor Timothy Jones has any prior violations of federal fishery regulations. Joint Stipulation at ¶ 24.

29. Respondent Timothy Jones was forthright and cooperative during the Agency's investigation into Respondents violation. Tr. at 18:19-25.

30. Respondent Timothy Jones recognized that he was ultimately responsible for ensuring that AO Shibi, Inc.'s longline permits were renewed every year. Tr. at 26:11-14; 32:11-13.

31. Respondent Timothy Jones claimed that he did not receive the renewal packet from NOAA for the March 3, 2010-March 3, 2011 fishing period. Tr. at 26:15-19; 27:25-28:3. There is insufficient record evidence to support a finding that NOAA failed to send a renewal packet to Respondents. However, even if NOAA failed to send a renewal packet to Respondents, such fact would not be exculpatory. This conclusion is based on the fact that Respondents had an independent duty to renew their longline permits regardless of whatever informational notices the Agency does or does not provide.

32. Respondent Timothy Jones first realized that his permits had expired when Officer Newman contacted him subsequent to the March 30 through April 13, 2010 fishing operations. Tr. at 28:7-14.

33. As a result of this enforcement action and proceeding, Respondent Timothy Jones realized that he cannot legally rely on receiving a renewal packet from the Agency to timely file his application for renewal of permits. Tr. at 31:5-12.

V. Analysis

The Joint Stipulations clearly establish the fact of violation and Respondents did not contest that they failed to timely renew their Permit before setting out on the fishing trip from

March 30 through April 13, 2010. Respondents fished for, caught, and retained Western Pacific pelagic management unit species during their March 30 – April 13, 2010 fishing operations and had no valid Agency permit to allow them to do so. Based on these facts, the only issue to be determined is the amount of penalty, if any, to be assessed for Respondents' violation.

VI. Ultimate Findings of Fact and Conclusions of Law

1. During the period from March 30 – April 13, 2010, Respondents AO Shibi, Inc. and Timothy Jones were "persons" as defined under the Magnuson-Stevens Fishery Conservation and Management Act. Joint Stipulation at ¶ 5.

2. Respondents fished for, caught, and retained Western Pacific pelagic management unit species using longline gear with the F/V AO SHIBI GO from March 30 through April 13, 2010 without having a valid Hawaii Longline Limited Entry Permit. Joint Stipulation at ¶¶ 8-11, 15.

3. All of Respondents' fishing operations with the F/V AO SHIBI GO that occurred between March 30 and April 13, 2010 took place within the EEZ of the United States. Joint Stipulation at ¶ 12.

4. Respondents violated the Magnuson-Stevens Fishery Conservation Management Act (16 U.S.C. § 1801 et seq.) and Agency regulations at 50 C.F.R. §§ 665.15(a) and 665.802(c) by engaging in the fishing operations with the F/V AO SHIBI GO that occurred between March 30 through April 13, 2010.

VII. Consideration of Penalty Assessment

In assessing a penalty, I considered each of the factors required by law. "Factors to be taken into account in assessing a penalty . . . may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior

violations . . . and such other matters as justice may require." 15 C.F.R. § 904.108(a). See also 16 U.S.C. § 1858(a) (same factors must be considered under the Magnuson Act). In 1990, Congress raised the maximum penalty under the Magnuson Act from $25,000 to $100,000, but the House Report cautioned that civil penalties of that magnitude should be pursued only "in cases of significant and sever offenses or serious repeat offenses." H.R. Rep. No. 393, 101st Cong., 2d Sess. 230-31 (1989). Under the Federal Civil Penalties Inflation Act, Pub. L. 101-410, the amount of the maximum penalty per violation has increased to $140,000. 15 C.F.R. § 6.4(e)(14); 73 Fed. Reg. 75322 (Dec. 11, 2008). Respondents did not assert an inability to pay in accordance with the requirements of Agency regulations. See 15 C.F.R. § 904.108(b)-(h).

The Agency seeks a total civil penalty of $1,500.00 against Respondents based on one violation of the Magnuson Act and Agency regulations.

A. The Nature, Circumstances, Extent and Gravity of the Violations

Fishing without a permit, where such a permit is required, is clearly a serious matter, as the management of the fisheries depends on the adherence of fishery participants to all the rules and regulations governing such participation. In another Hawaii Longline Limited Entry Permit case involving similar circumstances, I found the Respondents unlawfully fished with an expired longline entry permit (among other violations) and assessed $1,000.00 against each Respondent for such violation. See In re Flores and Astara Company, LLC, 2009 WL 2053602 (N.O.A.A., May 28, 2009).[6] In that case, Respondents fished on two trips in January 2007 with a permit that had expired in March 2006. Id.

[6] In Flores, the total penalty of $61,000.00 was apportioned between the two Respondents based on the facts and circumstances surrounding the violations. However, each of the Respondents was assessed $1,000.00 for the longline permit violation.

Here, unlike Respondents in Flores, Respondents conducted fishing operations relatively close to the expiration of their longline permit and did not engage in any other prohibited actions. Respondents' longline permit expired March 3, 2010 and they began fishing operations without renewing the permit on March 30, 2010. It is more likely than not Respondents simply failed to realize that their longline permit had expired before conducting fishing operations in March 2010. Respondents received $39,620.73 for the fish caught during their March 30-April 13, 2010 fishing operations when they did not have a valid longline permit. However, since this case involves regulatory compliance issues rather than resource depletion violations, the value of the catch does not (and should not) influence the issue of the appropriate penalty under the facts and circumstances present herein.

B. Respondents' Degree of Culpability

The record clearly indicates that Respondents did not intentionally violate the Magnuson Act or the Agency regulations and took corrective actions to renew their longline permit once they became aware of the expiration. Nor did Respondents conduct any further fishing operations (with either of their boats) without a valid permit.

Respondents have a history of compliance with the longline permit regulations and are not willful violators. Respondents further recognize that the ultimate responsibility to renew their permits is theirs alone in spite of whatever reminders the Agency might chose to send. The penalty should reflect this fact. Indeed, it is extremely unlikely that Respondents will commit this same violation in the future. Therefore, a reduced penalty from that sought by the Agency is clearly warranted.

C. Respondents' Prior Offenses

Respondents have no prior offenses of the Magnuson Act in the past five years.

D. Other Matters As Justice Requires

Some precedent under the Federal Tort Claims Act holds that when the government voluntarily assumes a duty, it has an obligation to perform such a duty with due care. See, e.g., Indian Towing Co. v. United States, 350 U.S. 61, 76 (1955) (United States Coast Guard had no obligation to establish a particular light house, but if it did so, it had a duty of care to keep it in working condition); see also Rogers v. United States, 397 F.2d 12, 14 (4th Cir. 1968). Even assuming this principle applied, such reliance would in no way excuse Respondents' violation but could serve as a slight mitigating factor in assessing a penalty should it be adequately demonstrated that the Agency did not, in fact, send out such a renewal notice to Respondents.

However, the record does not establish with sufficient reliability that the Agency failed to send out the renewal packet to Respondents (see, e.g., Tr. at 22:22-23:7 (Agency sent out renewal packets generally for the relevant time period)) or otherwise negligently performed its voluntary effort to remind the fishing community about the need to renew its permits.[7] To be clear, the Agency is under no statutory or regulatory duty to send out such reminders.

This is not to say that I find Respondent Jones incredible in his testimony that he did not receive the renewal packet; but rather, it is just as likely that Mr. Jones either does not recall receiving the renewal packet or the renewal packet simply did not get delivered to Respondents through no fault of the Agency. See, e.g., Tr. at 34:18-21 (Respondent admitting that "there's a lot of things that go on in your head and you're worried about. A lot of things. No excuses, but things slip into the cracks").

Furthermore, a highly regulated industry, like the professional fishing community, is presumed to know the regulations that govern its enterprise and must comply accordingly. See

[7] See also Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976) (presumptions of due delivery of the mail and regularity in government agency's handling thereof "have a common origin in regularity of action").

In re Peterson, 6 O.R.W. 486. 490 (N.O.A.A. 1991). Respondents held longline permits from 2002 and had gone through the renewal process yearly since that time. These permits had to be renewed every year by the same date. Respondents should have been well aware of both the timing and the procedures for renewing their permits and their failure in timely renewing the permits cannot excuse such failure.

Therefore, in light of all the facts and circumstances surrounding this case, a reduction in the Agency's proposed penalty is warranted and I find a penalty in the amount $1,000.00 appropriate.

VIII. Order

WHEREFORE:

IT IS HEREBY ORDERED that a civil penalty in the total amount of **ONE THOUSAND DOLLARS** ($1,000.00) is assessed, jointly and severally, against Timothy Jones and AO Shibi, Inc.

PLEASE BE ADVISED that a failure to pay the penalty within thirty (30) days from the date on which this decision becomes final Agency action will result in interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling the delinquent penalty. Further, in the event the penalty or any portion thereof becomes more than ninety (90) days past due, an additional penalty charge not to exceed six (6) percent per annum may be assessed.

PLEASE BE FURTHER ADVISED that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this Initial Decision and Order as provided in 15 C.F.R. § 904.273. Copies of the petition should also be

sent to the ALJ Docketing Center, NOAA counsel, and the presiding judge. A copy of 15 C.F.R. § 904.273 is attached as **Attachment B** to this order.

If neither party seeks administrative review within 30 days after issuance of this order, this Initial Decision will become the final decision of the agency.

IT IS SO ORDERED.

Done and dated this 20th day of December, 2011
at Alameda, CA.

HON. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

ATTACHMENT A: LIST OF WITNESSES AND EXHIBITS

Agency Witnesses

1. NOAA Enforcement Officer Paul Newman

Respondents' Witnesses

1. Timothy Jones (Respondent)

Agency's Exhibits (Agency Exh. 1 through Agency Exh. 8).

1. Offense Investigation Report[8]
2. F/V AO SHIBI GO Certificate of Documentation
3. Hawaii Longline Limited Entry Permit No. 554581 for the F/V AO SHIBI GO, effective from March 3, 2009 through March 3, 2010 and Application Form filed for same
4. Western Pacific Longline Fishing Logs Nos. 422734-422748 for the F/V AO SHIBI GO
5. Copies of 50 C.F.R. §§ 665.15-17; 665.802
6. Agency Penalty Schedule for the Western Pacific Pelagic Fishery
7. Hawaii Longline Limited Entry Permit application dated June 13, 2010 from AO Shibi, Inc., received by NMFS/PIRO on June 14, 2010
8. Records from United Fishing Agency showing amount paid to Respondents for fish caught during fishing trips of the F/V AO SHIBI GO during which it did not have valid Hawaii Longline Limited Entry Permit[9]

[8] A scrivener's error in Agency Exh. 1 at page 3 was corrected at the hearing by modifying the fishing dates from "March 15, 2010 to April 15, 2010" to "March 30, 2010 to April 13, 2010". See Tr. at 6:3-8:1.

[9] Respondents initially objected to the introduction of this exhibit but later withdrew their objection based on discussions at the hearing and it was therefore admitted into evidence. See Tr. at 8:25-16:18.

ATTACHMENT B: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

49 C.F.R. § 904.273

Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review;

except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.